

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35927

STATE OF IDAHO,	)	2010 Unpublished Opinion No. 390
	)	
Plaintiff-Respondent,	)	Filed: March 17, 2010
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
ILDAR DURSUNOV,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

---

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Judgment of conviction and unified twenty-year sentence with six-year determinate term for lewd conduct with a minor, affirmed.

Daniel S. Brown of Fuller Law Offices, Twin Falls, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

---

LANSING, Chief Judge

Ildar Dursunov pleaded guilty to lewd conduct with a minor under sixteen. He appeals from his judgment of conviction and the district court's denial of his motion for reduction of his sentence, arguing that the use of an unqualified interpreter for Dursunov's polygraph and psychosexual examinations deprived him of due process, that his sentence is excessive, and that the court erred in denying the motion for reduction of Dursunov's sentence.

I.

BACKGROUND

The fourteen-year-old victim in this case stated that Dursunov, who was twenty-one, invited her to a party where he served her alcohol and then had sexual intercourse with her. Dursunov was charged with, and pleaded guilty to, lewd conduct with a minor under sixteen, Idaho Code § 18-1508.

Before sentencing, the district court ordered a psychosexual evaluation. Dursunov, whose native language is not English,<sup>1</sup> was provided a Russian interpreter for the psychosexual examination that included a polygraph test. At sentencing, Dursunov told the district judge that he disagreed with the characterization of some of his words at the psychosexual examination but made it clear that he was not contending the characterization of his words made the evaluation invalid. Dursunov was sentenced to a twenty-year term of imprisonment with six years determinate.

Dursunov then filed an Idaho Criminal Rule 35 motion, arguing that his sentences were imposed in an illegal manner because the interpreter for his psychosexual evaluation was deficient and the polygraph was not performed properly. Additionally, Dursunov argued for leniency based on the same information and the testimony of a licensed professional counselor, Gail Ater, that Dursunov was amenable to rehabilitation.

## **II.**

### **DISCUSSION**

#### **A. Was the Defendant's Right to Due Process Violated at the Sentencing Hearing by the Use of an Unqualified Interpreter?**

Dursunov contends that he was deprived of the right to due process in his sentencing proceedings because an unqualified interpreter was provided to interpret for him during the psychosexual examination and polygraph examination. We conclude that his assertion of this claim on appeal is barred because at his sentencing hearing Dursunov expressly disclaimed any objection to the interpretation during these evaluations or to the court's reliance upon the evaluation reports.

At the sentencing hearing, after stating there were no corrections, amendments, or additions to the presentence report, which contained the psychosexual evaluation, Dursunov's counsel made his sentencing recommendation. During this recommendation, he commented on Dursunov's disagreement with how the interpreter had interpreted Dursunov's comments at the psychosexual examination. Thereafter, the following exchange took place:

[PROSECUTOR]: Your Honor, I'm not sure we should [sic] address the comments that the defendant indicated, that he disagreed with the interpretation during his psychosexual evaluation. I'd kind of like to make sure that the record's

---

<sup>1</sup> Dursunov's native language is Turkish but he has been speaking Russian since he was eight.

clear, so that in years to come in this case, if it comes to that, we don't have questions that this psychosexual was improperly done or that in some way he wasn't given his full rights to that; and if maybe counsel can clarify for the record that, as he said previously, he had no objections to the presentence report or that evaluation, if that carries through, or if we're going to have objections to this evaluation come down the pike in the future, the state would appreciate that clarification.

....

[DEFENSE]: Your Honor, I did speak with my client on that issue. And I should have clarified, and I apologize to the state.

What I meant to say is that [Dursunov] disagreed with the characterization of his words at the psychosexual.

I have been through the PSI and the psychosexual with him; and we can find no additions or corrections; and so the statements contained here are valid. It's only that we, that he had a problem with the characterization of his words at the psychosexual meeting. But we can find nothing wrong with the PSI.

THE COURT: And he's not contending that the characterization of his words in some way makes this an invalid evaluation?

[DEFENSE]: No, Your Honor.

As this exchange shows, Dursunov specifically consented to and acquiesced in the court's reliance on the psychosexual evaluation regardless of any reservations he may have had regarding the interpretation of his words. It was only after Dursunov received a harsher sentence than was suggested by the psychosexual evaluator that he first asserted that an unqualified interpreter had been used. "It is the fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." *State v. Carlson*, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). That is, an appellate court will not review a claim of error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error. *State v. Barnes*, 133 Idaho 378, 384, 987 P.2d 290, 296 (1999). The admission of evidence will not serve as a basis for reversal on appeal unless a timely objection was made in the trial court. Idaho Rule of Evidence 103(a)(1); *State v. Gleason*, 130 Idaho 586, 592, 944 P.2d 721, 727 (Ct. App. 1997). There having been no objection to the psychosexual and polygraph examinations at the sentencing hearing, Dursunov cannot now claim a violation of due process through the court's reliance on those evaluations.<sup>2</sup>

---

<sup>2</sup> Dursunov also argues that the court abused its discretion in imposing a unified twenty-year sentence with six years determinate. His argument on this issue, however, is predicated entirely upon evidence later presented at his Rule 35 motion. Therefore, we will consider the

**B. Did the District Court Err in Denying Dursunov's I.C.R. 35 Motion?**

Dursunov argues that the district court erred in determining Dursunov's sentence was not imposed in an illegal manner because his due process rights were violated when the district court relied upon the psychosexual evaluation that was based on an examination in which Dursunov was not given a qualified interpreter and on a polygraph that was invalid under the guidelines of the American Polygraphers' Association. Dursunov also argues that the district court abused its discretion in finding that the sentence was not excessive in light of the additional information presented at the I.C.R. 35 hearing concerning the unqualified interpreter, invalid polygraph, and testimony from Gail Ater that Dursunov was amenable to rehabilitation.

A trial court may correct a sentence imposed in an illegal manner pursuant to I.C.R. 35. *State v. Clements*, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009); *State v. Farwell*, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007). We exercise free review over whether a sentence was imposed in an illegal manner. *Id.* We also exercise free review when determining whether constitutional rights have been violated in light of the facts of the individual case. *State v. Rogers*, 144 Idaho 738, 740, 170 P.3d 881, 883 (2007); *State v. Brauch*, 133 Idaho 215, 218, 984 P.2d 703, 706 (1999); *State v. Hedges*, 143 Idaho 884, 886, 154 P.3d 1074, 1076 (Ct. App. 2007). A defendant's due process rights include the right to understand the proceedings against him. *Murillo v. State*, 144 Idaho 449, 452, 163 P.3d 238, 241 (Ct. App. 2007); *State v. Hernandez*, 120 Idaho 785, 788, 820 P.2d 380, 383 (Ct. App. 1991).

The district court held that Dursunov's claim that his due process rights were violated because he was provided an unqualified interpreter was unavailing because Dursunov was judicially estopped from asserting it. We agree. We have already quoted the exchange at the sentencing hearing in which Dursunov specifically stated the psychosexual evaluation was valid and accurate, even in light of his dissatisfaction with the translator. Indeed, during Dursunov's sentencing recommendation to the court he stated, "Your Honor, we will--we concur with the recommendations of the psychosexual evaluator." The district court explained in a well-reasoned analysis:

---

issue only in the context of our review of the district court's denial of Dursunov's Rule 35 motion.

Dursunov and his counsel were provided ample opportunity at the sentencing hearing: 1) to object to the pre-sentence report, to the psycho-sexual evaluation and/or the polygraph; 2) to seek a delay to challenge the evaluation and its contents; and 3) to provide additional information or evidence to the court for consideration. No such objection or requests were made; to the contrary, representations were made that the defendant had no quarrel with the evaluation, which included the polygraph. The defense even made a point of concurring with the recommendation of the evaluator for a retained jurisdiction or county jail. Beyond that, Dursunov's counsel represented that Dursunov "speaks excellent English." Such representations at sentencing are wholly inapposite with the position now advanced that the interpreter somehow invalidated Dursunov's evaluation. Beyond that, counsel and the court had a specific discussion regarding the interpreter issue before sentence was pronounced and counsel assured the court that the translator's characterization of Dursunov's words did not invalidate the evaluation.

....

A party cannot take inconsistent positions before the court, or otherwise speak out of both sides of one's mouth. *Cf. Loomis v. Church*, 76 Idaho 87, 93-94, 277 P.2d 561, 565 (1954) (a litigant is estopped from adopting inconsistent and contrary positions arising out of the same transaction or subject matter); *McKay v. Owens*, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997) (the policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts.).

We adopt the district court's reasoning that Dursunov is judicially estopped from "playing fast and loose" with the courts by inducing the district court to rely on the psychosexual evaluation in the hope that the court would follow the evaluator's recommendations and then asserting the opposite position in order to claim error after the district court imposed a harsher sentence than Dursunov desired.

In addition, Dursunov's argument that the polygraph--done without strict adherence to the American Polygraph Association guidelines--violates his due process rights fails for lack of authority. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Dursunov merely states in a conclusory manner that a polygraph used to create a psychosexual evaluation violates due process if it does not comply with APA guidelines, but cites no legal authority for this claim. Not only does Dursunov's argument lack legal support but factual support is missing as well. Dursunov failed to include in the record on appeal the only evidence he presented, a letter, suggesting that the

polygraph was done in contravention of APA guidelines.<sup>3</sup> Thus, on the record before us, Dursunov has not shown even that the polygraph violated APA guidelines. We therefore affirm the district court's determination that Dursunov's sentence was not imposed in an illegal manner based on the use of the polygraph.

We also hold that the district court did not abuse its discretion in denying Dursunov's request that his sentence be reduced as a matter of leniency. Appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). The objectives of sentencing, against which the reasonableness of a sentence is to be measured, are the protection of society, the deterrence of crime, the rehabilitation of the offender, and punishment or retribution. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). *See also* I.C. § 19-2521. Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

A motion for reduction of a sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting an I.C.R. 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In conducting our review of the grant or denial of an I.C.R. 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*,

---

<sup>3</sup> Dursunov attached to his appellate brief his I.C.R. 35 motion, to which the letter evidencing a violation was attached. However, neither his motion nor the letter itself was augmented into the appellate record. Because these documents are not in the record on appeal, we do not consider them. *See Chisholm v. Idaho Dep't of Water Res.*, 142 Idaho 159, 162-63, 125 P.3d 515, 518-19 (2005).

113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984).

In denying Dursunov's Rule 35 motion the district court stated:

The starting point for this court's review regarding a request for leniency is to reiterate the nature of the offense for which Mr. Dursunov received his sentence. Mr. Dursunov committed a sex crime on a 14-year-old girl. The court discussed at sentencing the alleged violent nature of the attack and the way the crime has affected the child victim. . . . Nothing that [was] provided at the Rule 35 hearing changes . . . the nature of this offense.

Dursunov's conduct has forever changed the course of the minor victim's life; his conduct is significant, and warrants significant punishment, both as a deterrent to him and to others like him, and as a representation of society's disdain for the behavior in which he engaged. This court specifically noted at sentencing that it does not find beyond a reasonable doubt that this was a forcible rape; however, whatever moniker is attached to the act, the effect of the sexual crime on the minor-victim has been profound. "A sexual assault is one of the most distressing experiences a person could have." *State v. Hansen*, 133 Idaho 323, 326[], 986 P.2d 346, 349[] (Ct. App. 1999). *See also State v. Jackson*, 130 Idaho 293, 295, 939 P.2d 1372, 1374 (1997) ("although [sic] a fixed life sentence is a serious sentence, lewd and lascivious conduct with a minor under sixteen is a serious crime. The physical injures [sic] can be severe, and the mental and emotional trauma can be permanent.")[]; *State v. Stover*, 126 Idaho 258, 265, 881 P.2d 553, 560 (Ct. App. 1994) ("psychological [sic] damage to the victims of sexual molestation may be long-lasting and irreversible. Our legislature's authorization of life imprisonment as a maximum sentence for lewd conduct with a minor under the age of sixteen reflects a societal conviction that such conduct warrants severe punishment.").

The minor victim in this case has suffered significant trauma from this event, as evidenced by her grandmother's statement at the sentencing hearing. Dursunov's crime was a significant, violent, and disturbing event in the child's life; therefore, this case calls for a retributive response from the court, simply to underscore the impact his crime had on the minor child.

Accordingly, the court recognized, both at sentencing and now, that the crime which Mr. Dursunov committed, "warrants severe punishment." . . .

....

[T]he shadow cast by Mr. Dursunov's disregard for the [victim] outweighed the concerns for Dursunov individually or for his family. . . . [T]he bottom-line is that Dursunov's background and circumstances do not obliterate the need for a stark sentence from a societal point-of-view.

The court also recognizes that Gail Ater's testimony now indicates that Dursunov, in Ater's opinion, is a candidate for rehabilitation. Mr. Ater stated this conclusion more directly than did [the psychosexual evaluator]; however, the point remains that "rehabilitation [sic] . . . is not the sole objective of our criminal justice system." *State v. Tucker*, 123 Idaho 374, 377, 848 P.2d 432, 435 (Ct. App. 1993). This court recognizes that Dursunov may be able to attend treatment; he

may be able to converse in a coherent manner in English while in treatment; he may be able to understand and implement the concepts learned in treatment to remain free from sexual misconduct. The court simply feels that such an undertaking should begin, at its earliest, in approximately six years from the date of sentencing, rather than immediately or after a rider, based upon the other factors of sentencing . . . .

Additionally, the district court noted that it had already exercised leniency “when it set the fixed portion of the sentence at six years, as opposed to fifteen or more.”

When a court reasonably determines that other sentencing objectives outweigh the goal of rehabilitation, a district court does not abuse its discretion in denying a motion for leniency under I.C.R. 35. *State v. Moore*, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998); *Lopez*, 106 Idaho at 450-51, 680 P.2d at 872-73. The district court’s analysis, that other sentencing factors outweighed any additional information concerning rehabilitation potential, is well reasoned. Taking into account the new information presented on Dursunov’s Rule 35 motion, we cannot say that his sentence is excessive. Therefore, the district court did not abuse its discretion in denying the motion.

### **III.**

#### **CONCLUSION**

Dursunov has shown no error in the sentencing proceedings nor in the district court’s denial of Dursunov’s I.C.R. 35 motion. We therefore affirm both the judgment of conviction and the order denying Dursunov’s I.C.R. 35 motion.

Judge GUTIERREZ and Judge GRATTON **CONCUR.**